

NO. 47147-7-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHAWN N. SALTERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Toni A. Sheldon, Judge
Cause No. 14-1-00410-9

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

- 01. The sentencing court erred in calculating Salters's offender score and sentencing range.
- 02. The trial court erred in imposing a community custody condition prohibiting Salters's from going into places whose primary business is the sale of alcohol.
- 03. The trial court erred in imposing legal and financial obligations on Salters.
- 00. The sentencing court erred in permitting Salters to be represented by counsel who failed to object to the sentencing court's calculation of his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 01. Whether the sentencing court erred in properly determining Salters's offender score and sentencing range where the State failed to establish his alleged prior criminal history by a preponderance of the evidence?
[Assignment of Error No. 1].
- 02. Whether the sentencing court acted without authority in ordering Salters not to go into places whose primary business is the sale of alcohol?
[Assignments of Error No. 2].
- 03. Whether the trial court improperly imposed legal and financial obligations on Salters without first inquiring into his ability to pay?
[Assignment of Error No. 3].
- 00. Whether the sentencing court erred in permitting Salters to be represented by counsel who failed

to object to the sentencing court's calculation of his offender score?

[Assignment of Error No. 0].

C. STATEMENT OF THE CASE

01. Procedural Facts

Shawn S. Salters was charged by information filed in Mason County Superior Court September 29, 2014, with unlawful possession of methamphetamine, count I, and theft in the third degree, count II, contrary to RCWs 69.50.4013(1) and 9A.56.050(1). [CP 113-14].

The court denied Dunham's pretrial motion to suppress evidence under CrR 3.6 and entered the following Findings of Fact and Conclusions of Law:

Findings and Conclusions

1. Sgt. Mike Fiola from the Shelton Police Department was dispatched to Walmart located in Mason County Washington on September 25, 2014. Sgt. Fiola entered the Asset Protection office and observed the Defendant on closed circuit television via surveillance video. The Defendant appeared to be selecting merchandise from the shelves and using a utility knife to remove packaging, and then placing the merchandise in a back pack. After the Defendant exited passed all point of sale, Sgt. Fiola arrested the Defendant by placing him in hand cuffs.

2. Sgt. Fiola identified the Defendant and notified him that he was under arrest. Sgt. Fiola walked the Defendant back to the Asset Protection Office located close to the scene of arrest where Walmart employees processed paper work, and where Sgt. Fiola and other police officers

from the Shelton Police Department (i.e. Officer Auderer and Officer Blaylock) searched the Defendant and the back pack.

Conclusions of Law

1. The court has jurisdiction over the parties and the subject matter of this action.

2. Sgt. Fiola had probable cause to arrest the Defendant for theft at the point of initial contact.

3. The search of the defendant was a lawful search incident to arrest.

4. The search of the Defendant's back pack was a lawful search incident to arrest because the back pack was in the Defendant's actual possession at the time of his arrest and searched within minutes of Sgt. Fiola's initial contact with the Defendant.

5. Based on the foregoing findings of facts and conclusions of law the court denies Defendant's Motion to Dismiss.

[CP 42-43].

Following the court's denial of Salters's motion to dismiss for prosecutorial misconduct and the State's motion for sanctions, trial to a jury commenced December 3, the Honorable Toni A. Sheldon presiding. [CP 44]. Neither objections nor exceptions were taken to the jury instructions. [RP 248]. Salters was found guilty, sentenced within his standard range, and timely notice of this appeal followed. [CP 3, 21-39].

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02. Substantive Facts: CrR 3.6 Hearing

On September 25, 2014, Sergeant Mike Fiola of the Shelton Police Department responded to the report of a shoplifting at a local Walmart. [RP 7-8]. Upon arrival, Fiola went into the store and viewed a surveillance monitor showing Salters taking merchandise, removing the packaging with a knife, and then placing the items in a backpack. [RP 8-9, 16].

After passing all points of sale without paying, Salters was stopped by Sergeant Fiola and Officer Greg Blaylock, handcuffed, and placed under arrest. [RP 7-10, 15, 105-05, 108]. The backpack was pulled off of Salters and Fiola maintained custody of it as Salters was escorted to the store's asset protection office, where the bag was searched and the stolen items recovered. [RP 10-12, 19, 105]. Suspected methamphetamine along with other items taken from the store were seized from Salter's pockets by Officer Blaylock. [RP 12, 24, 31,106].

03. Substantive Facts: Trial

Testimony at trial related the facts presented at the CrR 3.6 hearing [RP 126, 132, 144-45, 150-52, 167-68], adding that Salters was observed placing items into two bags [RP 234], both of which he possessed upon passing the last point of sale [RP 237, 243-44], and that the substance seized from his person tested positive for

methamphetamine. [RP 188]. Salters rested without giving opening statement or presenting evidence. [RP 247-48].

D. ARGUMENT

01. THE SENTENCING COURT ERRED IN CALCULATING SALTERS'S OFFENDER SCORE AND SENTENCING RANGE WHERE THE STATE FAILED TO ESTABLISH HIS ALLEGED PRIOR CRIMINAL HISTORY BY A PREPONDERANCE OF THE EVIDENCE.

A challenge to the calculation of an offender score may be raised for the first time on appeal. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. State v. Mitchell, 81 Wn. App. 387, 390, 914 P.2d 771 (1996).

At sentencing, the court determined Salters's offender score by relying solely on information recited by the prosecuting attorney. [RP 278-79]. Salters's alleged prior criminal history included seven adult felony

convictions in Washington. [CP 23]. His offender score was set at 7, which did not include a juvenile residential burglary. [RP 279; CP 23].

The State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. State v. Hunley, 175 Wn.2d 901, 909-1-, 287 P.3d 584 (2012). “The best evidence of a prior conviction is a certified copy of the judgment.” State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). A defendant must affirmatively acknowledge the “facts and information” the State introduces at sentencing in order to relieve the State of its burden of proof. State v. Mendoza, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009). Neither a defendant’s failure to object to the prosecuting attorney’s statement of criminal history nor his or her recommendation of a sentence in the same range calculated by the prosecuting attorney, constitutes an affirmative acknowledgement of the alleged criminal history. Id. at 928.

Salters’s did not affirmatively acknowledge his prior criminal history, and the prosecutor’s unsupported summary of his alleged prior convictions is insufficient to establish Salters’s prior criminal history by a preponderance of the evidence. State v. Hunley, 175 Wn.2d at 217.

Salters’s sentence must be vacated and remanded for resentencing.

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02. THE TRIAL COURT ACTED WITHOUT
AUTHORITY IN ORDERING SALTERS
NOT TO GO INTO PLACES WHOSE
PRIMARY BUSINESS IS THE SALE OF
ALCOHOL.

At sentencing, as conditions of community
custody, the court, in part, ordered that:

The defendant shall not go into bars,
taverns, lounges, or other places whose primary business is
the sale of liquor....

[CP 33].

“In the context of sentencing, established case law holds that
illegal or erroneous sentences may be challenged for the first time on
appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008)
(quoting State v. Ford, 37 Wn.2d at 477). This court reviews whether a
trial court had statutory authority to impose community custody conditions
de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The conditions of community custody may include “crime-related
prohibitions.” Former RCW 9.94A.700(5)(e), recodified as RCW
9.94B.050(5)(e). A “crime-related prohibition” is defined as “an order of a
court prohibiting conduct that directly relates to the circumstances of the
crime for which the offender has been convicted...” RCW 9.94A.030(10).

There was no evidence at trial that alcohol played any part in
Salters’s crimes. In State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003),

the defendant pleaded guilty to several offenses and the court imposed conditions of community custody relating to alcohol consumption and treatment. As here, nothing in the record indicated that alcohol contributed to Jones's offenses. Id. at 207-08. This court found that although the trial court had authority to prohibit consumption of alcohol, it did not have the authority to order the defendant "to participate in alcohol counseling(.)" Id. at 208, reasoning that the legislature intended a trial court to be able "to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense." Id. at 206. In contrast, when ordering participation in treatment or counseling, the treatment or counseling must be related to the crime. Id. at 207-08; see also State v. McKee, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (community custody provisions prohibiting purchasing and possession of alcohol invalid where alcohol did not play a role in the crime), reviewed denied, 163 Wn.2d 1049 (2008). And while RCW 9.94A.703(3)(e), authorizes the sentencing court to order that an offender refrain from consuming alcohol, there is no such authority forbidding an offender from frequenting places whose primary business is the sale of liquor, sans any evidence and argument that it qualifies as a crime-related prohibition under RCW 9.94A.703, which constitutes "an order of a court prohibiting conduct that directly relates to

the circumstances of the crime for which the offender has been convicted....” RCW 9.94A.030(10).

The condition prohibiting Salters from frequenting places selling liquor is invalid because there was no evidence that alcohol played any part in his offenses, with the result that it is not a crime-related prohibition and must be stricken.

03. THE TRIAL COURT IMPROPERLY
IMPOSED LEGAL AND FINANCIAL
OBLIGATIONS ON SALTERS
WITHOUT FIRST INQUIRING INTO
HIS ABILITY TO PAY.

Before imposing discretionary legal financial obligations (LFOs) the sentencing court must consider Ames’s current and future ability to pay:

RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future to pay before the court imposes LFOs. This inquiry also requires the court to consider the important factors, such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay. . . .

State v. Blazina, ___ Wn.2d ___, 344 P.2d 680, 685 (2015).

Here, the court imposed \$3,290.30 in discretionary legal financial obligations: \$ 63.30 (witness costs), \$277 (sheriff service fees) \$250 (jury demand fee), \$600 (court appointed attorney), \$2,000 (fine), \$100 (crime lab fee). [CP 27]. This was done without consideration of Salters’s current

and future ability to pay. [RP 283-84]. The court made no inquiry into any factors that would have been relevant to its decision.

While Salters did not object to the imposition of the costs below, RAP 2.5(a), as recognized by our Supreme Court in Blazina, 344 P.3d at 683, grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. State v. Russell, 171 Wn.2d 118, 122, 249 P.3d 844 (2011). The Blazina court, while noting that each appellate court must make its own decision in this regard, further opined that “(n)ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” Blazina, 344 P.3d at 683.

There is no evidence in the record that the sentencing court made the individualized and detailed inquiry as is now necessary under Blazina. Concomitantly, there is nothing in the record to support the trial court’s finding that Salters has the ability to pay the discretionary LFOs. He is 38, serving time in prison, and has an extensive criminal history. It will not happen.

This court should exercise its discretion and reach the merits of Salters’s claim and remand for resentencing with instructions for the trial court to conduct an on-the-record inquiry consistent with Blazina.

04. SALTERS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE SENTENCING COURT'S CALCULATION OF HIS OFFENDER SCORE.¹

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

¹ While it has been previously argued that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

While the invited error doctrine precludes review of any error initiated by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Should this court find that trial counsel waived the issue set forth previously relating to the sentencing court's calculation of Salters's offender score, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly object to the trial court's determination of Salters's offender score for the reasons set forth in the prior section.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice is self-evident. Again, as set forth in the prior section, had counsel properly made the

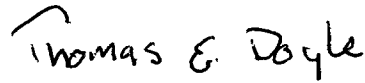
objection, the sentencing court would not have imposed the sentence based on the miscalculation of Salters's offender score.

E. CONCLUSION

Based on the above, Salters respectfully requests this court to remand for resentencing.

DATED this 31st day of May 2015.

Respectfully submitted,

A handwritten signature in black ink that reads "Thomas E. Doyle". The signature is written in a cursive style with a large, sweeping initial 'T'.

THOMAS E. DOYLE
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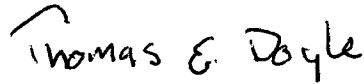
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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